



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Release Number: **201329026**
Release Date: 7/19/2013
Date: April 22, 2013
UIL Code: 4943.00-00

Contact Person:
Identification Number:
Contact Number:
Employer Identification Number:
Form Required To Be Filed:
1120
Tax Years:

Dear

This is our final determination that you do not qualify for exemption from Federal income tax as an organization described in Internal Revenue Code § 501(c)(3). Recently, we sent you a letter in response to your application that proposed an adverse determination. The letter explained the facts, law and rationale, and gave you 30 days to file a protest. Since we did not receive a protest within the requisite 30 days, the proposed adverse determination is now final.

Because you do not qualify for exemption as an organization described in Code § 501(c)(3), donors may not deduct contributions to you under Code § 170. You must file Federal income tax returns on the form and for the years listed above within 30 days of this letter, unless you request an extension of time to file. File the returns in accordance with their instructions, and do not send them to this office. Failure to file the returns timely may result in a penalty.

We will make this letter and our proposed adverse determination letter available for public inspection under Code § 6110, after deleting certain identifying information. Please read the enclosed Notice 437, *Notice of Intention to Disclose*, and review the two attached letters that show our proposed deletions. If you disagree with our proposed deletions, follow the instructions in Notice 437. If you agree with our deletions, you do not need to take any further action.

If you have any questions about this letter, please contact the person whose name and telephone number are shown in the heading of this letter. If you have any questions about your Federal income tax status and responsibilities, please contact IRS Customer Service at

1-800-829-1040 or the IRS Customer Service number for businesses, 1-800-829-4933. The IRS Customer Service number for people with hearing impairments is 1-800-829-4059.

Sincerely,

Holly O. Paz
Director, Rulings and Agreements

Enclosure
Notice 437
Redacted Proposed Adverse Determination Letter
Redacted Final Adverse Determination Letter



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Date: February 26, 2013

Contact Person:

Identification Number:

Contact Number:

FAX Number:

Employer Identification Number:

UIL:

Section 501

501.00-00

501.03-08

501.03-30

501.33-00

501.36-01

503.00-00

Legend

Date 1 =

Name =

State =

Vendor =

Website =

Dear :

We have considered your application for recognition of exemption from Federal income tax under Internal Revenue Code § 501(a). Based on the information provided, we have concluded that you do not qualify for exemption under § 501(c)(3). The basis for our conclusion is set forth below.

Facts:

1. Organizational Purpose and Governance

You are a State nonprofit membership corporation f/k/a Name incorporated on Date 1. Your Articles of Incorporation as amended state your purposes are to "... educate the public about the benefits of Open Source Software and other free software, provide support functions for such software, and provide funding for research that facilitates the improvement or creation of Open Source Software and other free software for the benefit of the public at large. . ." You have agreed to amend your Articles to delete "... provide support functions for such software. . ." if you otherwise qualify for exemption. Your Articles prohibit private inurement, carrying on impermissible propaganda, lobbying, or campaign intervention, and prohibits any activities not

permitted § 501(c)(3) organizations. A dissolution clause limits distribution of assets to one or more exempt purposes.

2. Operations and Activities

You state your activities further educational purposes within the meaning of § 501(c)(3). You began "as a grassroots response to [Vendor's] retraction of television programming data that was previously provided for free to individuals interested in improving and developing OSS and Freeware developers." "Members of the open source and free software communities banded together to find a way for their users to continue accessing [Vendor's] great guide data."

Your primary activity is buying television program listing data from Vendor (the "**TV Data**") and providing access to your members for a fee. TV Data is in raw XML format and includes fields such as program name, broad cast date, start and end times, station, call sign, channel, genre, and many others. "Education" is one of the more than 210 genres. The remaining genres range from "Adults Only," through "Crime Drama," "Game Show," "Law," "Suspense," to "Yacht Racing." Membership is open only to Individuals who must pay a \$ annual membership fee to access the TV Data. You pay about \$ of the membership fee to Vendor for TV Data access, and the remainder pays your other expenses.

You negotiated a subscription agreement with Vendor that limits TV Data access to (i) your members for personal non-commercial uses, and (ii) public schools for educational uses. The subscription agreement appears to be an arm's length transaction. You do not monitor member use of the TV Data. Vendor has algorithms to detect and prevent commercial use of this TV Data by your members. The agreement also limits TV Data access to software programs approved by you and Vendor. You and Vendor have approved about 40 open source software programs ("**Approved Software**"). You monitor these software programs to ensure they are not used commercially and disallow those which convert to commercial uses. There is no evidence that any of these software programs are owned by organizations exempt under § 501(c)(3).

You do not provide formal instruction, but your members develop on their own time and use the Approved Software programs with the TV Data. Individuals are able to learn programming techniques on their own, and are able to learn from each other, as they program such software, share it and understand what others have done." You also state that TV Data is "the raw material for open source developers to use in the development of software. This software cannot be developed in the abstract." Therefore, you claim that because work on open source software is an educational activity in and of itself, and access to TV Data is necessary for work on the approved open source software projects, then providing access to TV Data to your members furthers your educational purpose. You estimate that no more than of your members are developers involved in the development of the Approved Software packages. You do not monitor member use of the TV Data. You do know that twenty percent of your members do not access the TV Data.

On your website, you provide a moderated forum open to the public in which a moderator spends % of his time on this task. A moderator starts a topic, users post questions and moderators and users post answers. The questions and associated answers are threads. We asked how you instruct your members about open source software using TV Data. You replied

"Through questions and answers on [our] Forums. [Applicant] does not provide instruction as such." Therefore, members, in essence, educate themselves and others. You describe this forum Q & A as peer-to-peer education. In four years of operation the forum has 69 topics, with 266 comments, and about 90,000 views.

You will provide speakers at industry events educating developers and the public about the benefits of open source software. We requested copies of instructional materials your speakers will use but you do not have any.

You provide access to TV Data to some teachers in seven enrolled public schools and educational programs without charge. The teachers use the TV Data to locate television programs for use in their classroom instruction.

For access to the TV Data you pay to Vendor each month a sliding scale fee depending upon the number of your members for the month. All of your more than _____ members are individuals. You offer a free 7-day membership trial, a two-month extended trial membership for \$ _____, and a one-year membership for \$ _____. With _____ members about \$ _____ of the annual membership fee is paid to Vendor.

To access the TV Data an individual must become a member and pay the membership fee. You claim that membership fees are for the general support of the organization and not payment for member use of the TV Data. You offer trial memberships for a pro-rated membership fee where the only advertised benefit of membership is access to the TV Data. We asked why a current and complete data set must be made available and why a subset, such as TV Data for every other day or one day a week, would not be adequate for developing open source software. You responded that software testing could be done with such a subset but as a practical matter your members are not likely to be interested in that arrangement. We also asked if you were willing to limit TV Data access to public school teachers for use in the classroom. You said "No. Doing so would effectively eliminate interest in the [TV Data]."

You are funded almost entirely from membership fees. You state that "We have to charge a membership fee because Vendor charges us a licensing fee and we do not have enough large donors to pay for it without financial help from our members, through their donations and membership fees." Donations are a de minimis part of your revenue.

Your charter authorizes compensation for officers and employees.

Law

Section 501(c)(3) provides for recognition of exemption from federal income tax of organizations which are organized and operated exclusively for, among other things, educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(a)(1) of the Income Tax Regulations (the "regulations") provides that in order to be exempt as an organization described in § 501(c)(3), an organization must be both organized and operated exclusively for one or more purposes specified in that section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

Section 1.501(c)(3)-1(b)(1)(i) provides that an organization is organized exclusively for one or more exempt purposes only if its articles of organization (referred to in this section as its articles) as defined in subparagraph (2) of this paragraph: (a) Limit the purposes of such organization to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

Section 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of the exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Section 1.501(c)(3)-1(d)(3) defines the term 'educational', as used in § 501(c)(3), as relating to: (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

Section 1.501(c)(3)-1(e) provides that an organization may meet the requirements of § 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business, as defined in § 513. In determining the existence or nonexistence of such primary purpose, all the circumstances must be considered, including the size and extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.

In Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, the Supreme Court held that the presence of a single non-exempt purpose, if substantial in nature, will destroy a claim for exemption regardless of the number or importance of truly exempt purposes. The Court found that the trade association had an "underlying commercial motive" that distinguished its educational program from those carried out by universities.

Analysis

Section 501(c)(3) provides for recognition of exemption from federal income tax of organizations which are organized and operated exclusively for, among other things, charitable, religious, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual. Section 1.501(c)(3)-1(a)(1) provides that in order to be exempt as an organization described in § 501(c)(3), an organization must be both organized and operated exclusively for one or more purposes specified in that section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

1. Organizational Test

Section 1.501(c)(3)-1(b)(1)(i) states that an organization is organized exclusively for one or more exempt purposes only if its articles of organization both limit the purposes of such organizations to one or more exempt purposes, and do not expressly empower the organization

to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes. Your Articles of Incorporation as amended state purposes to "... educate the public about the benefits of Open Source Software and other free software, provide support functions for such software, and provide funding for research that facilitates the improvement or creation of Open Source Software and other free software for the benefit of the public at large. . ." Currently you are not organized for section 501(c)(3) purposes until you change your organizing document. When you amend your organizing document, to delete the 'support function' purpose, then you will be organized for section 501(c)(3) purposes.

2. Operational Test

Section 1.501(c)(3)-1(c)(1) provides that an organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of the exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Your primary activity is providing TV Data to your members for a fee, which is unrelated to your exempt purpose. Since this activity serves a substantial nonexempt purpose, you fail the operational test in § 1.501(c)(3)-1(c)(1) as further described below. See also § 1.501(c)(3)-1(e).

You buy access to TV Data from Vendor for about \$ per member per year, and sell that access to members for \$ per member per year. You also offer free 7 day trials, and reduced price two- month memberships to attract new members. Moreover, a substantial reason you charge a membership fee is to generate income to subscribe to the TV Data.

You claim that peer-to-peer learning to develop and use software is an exempt educational purpose and that providing TV Data to your members for a fee furthers that exempt educational purpose. Although you provide peer-to-peer learning among your members, their continuing subscription to the TV Data after they have learned to use an Approved Software program is not furthering educational purposes. You also provide TV Data access to public school teachers without charge. We agree this activity is furthering education; however, you provide this service to only a handful of teachers in seven school districts that subscribe to the TV Data. Your teacher membership is de minimis compared to your public memberships.

Providing access to the TV Data to your members consumes % of your revenues and consumes most of your efforts; it is more than insubstantial part of your activities. By any measure providing your members with access to TV Data is a substantial activity. While a de minimis number of TV Data uses further an educational exempt purpose, substantially more than half of the uses further an entertainment purpose. Therefore, you have a substantial nonexempt purpose. The Supreme Court held in Better Business Bureau v. United States, 326 U.S. 279 (1945), that a single nonexempt purpose, if substantial in nature, would preclude an organization from qualifying under § 501(c)(3). Because you have a substantial nonexempt purpose you are not regarded as operated exclusively for one or more exempt purposes. Accordingly, you do not qualify for exemption under § 501(c)(3).

You have the right to file a protest if you believe this determination is incorrect. To protest, you must submit a statement of your views and fully explain your reasoning. You must submit the statement, signed by one of your officers, within 30 days from the date of this letter. We will consider your statement and decide if the information affects our determination.

Your protest statement should be accompanied by the following declaration:

Under penalties of perjury, I declare that I have examined this protest statement, including accompanying documents, and, to the best of my knowledge and belief, the statement contains all the relevant facts, and such facts are true, correct, and complete.

You also have a right to request a conference to discuss your protest. This request should be made when you file your protest statement. An attorney, certified public accountant, or an individual enrolled to practice before the Internal Revenue Service may represent you. If you want representation during the conference procedures, you must file a proper power of attorney, Form 2848, *Power of Attorney and Declaration of Representative*, if you have not already done so. For more information about representation, see Publication 947, *Practice before the IRS and Power of Attorney*. All forms and publications mentioned in this letter can be found at www.irs.gov, Forms and Publications.

If you do not file a protest within 30 days, you will not be able to file a suit for declaratory judgment in court because the Internal Revenue Service (IRS) will consider the failure to protest as a failure to exhaust available administrative remedies. Code section 7428(b)(2) provides, in part, that a declaratory judgment or decree shall not be issued in any proceeding unless the Tax Court, the United States Court of Federal Claims, or the District Court of the United States for the District of Columbia determines that the organization involved has exhausted all of the administrative remedies available to it within the IRS.

If you do not intend to protest this determination, you do not need to take any further action. If we do not hear from you within 30 days, we will issue a final adverse determination letter. That letter will provide information about filing tax returns and other matters.

Please send your protest statement, Form 2848 and any supporting documents to this address:

Internal Revenue Service

1111 Constitution Ave, N.W.
Washington, DC 20224-0002

You may also fax your statement using the fax number shown in the heading of this letter. If you fax your statement, please call the person identified in the heading of this letter to confirm that he or she received your fax.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

Holly O. Paz
Director Rulings and Agreements